92-914

No. 92-914

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

BETTY KASSULKE, Warden, Kentucky Correctional Institution for Women, et al., - - - - - - - - - - Petitioners,

versus

LAFONDA FAY FOSTER, - - - Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a death row inmate transferred from her state of conviction is entitled to a higher standard of adequate access to courts than all other convicted felons solely because her sentence is death?
2. Whether it is the duty of a sending state, prior to an interstate transfer, to insure an inmate will have adequate access to her appointed counsel while in the receiving state?
3. Whether the order was a permanent injunction rather than a modification of a fully satisfied non-prospective preliminary injunction?

LIST OF PARTIES

The parties to the proceedings below were the Petitioners, Betty Kassulke, Warden, Kentucky Correctional Institution for Women; Elizabeth Chandler, Deputy Warden, Kentucky Correctional Institution for Women; Jack Stout, Deputy Warden, Kentucky Correctional Institution for Women; Steve Berry, Classification Manager, Corrections Cabinet, Commonwealth of Kentucky; Judith G. Morris, Classification Manager, Corrections Cabinet; John Wigginton, Secretary, Corrections Cabinet; Dewey Sowders, Warden, Northpoint Training Center; and, Respondent, LaFonda Fay Foster.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

BETTY KASSULKE, Warden, Kentucky Correctional Institution for Women, et al., - *Petitioners,*

v.

LAFONDA FAY FOSTER, - - - - - *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioners, Betty Kassulke, et al., respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-titled proceeding on July 29, 1992. The Court of Appeals denied a timely Petition for Rehearing on September 3, 1992.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Sixth Circuit has not been reported. It is reprinted in the Appendix hereto, pages 1a-3a, *infra.*

The June 19, 1991, Memorandum Opinion and Order of the United States District Court for the Western Dis-

trict of Kentucky (Ballantine, T.A.), has not been reported. It is reprinted in the Appendix hereto, pages 4a, *infra*.

JURISDICTION

In March 1989, invoking federal jurisdiction pursuant to 42 U.S.C. § 1983, Respondent LaFonda Fay Foster, a Kentucky death row inmate, brought this suit in the United States District Court for the Western District of Kentucky at Louisville against various Kentucky Corrections officials and others.[1]

On June 19, 1991 after a three-day evidentiary hearing, the district court granted Foster an injunction mandating her return to Kentucky from any state to which she might be transferred through the Interstate Corrections Compact, Kentucky Revised Statutes 196.610 [hereinafter Interstate Compact] if her conviction was upheld by the Kentucky Supreme Court and a petition for writ of certiorari was denied by this Court. Kentucky was directed to return Foster within 48 hours of the denial of the petition in order for Foster to exhaust any post-conviction appeals with her appointed counsel. It is from this June, 1991 injunction that Corrections sought relief through an appeal to the United States Court of Appeals for the Sixth Circuit.

On appeal, the United States Court of Appeals for the Sixth Circuit on July 29, 1992, affirmed the district court

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[1]The suit against the Kentucky Department of Public Advocacy and the Justices of the Kentucky Supreme Court was dismissed in March, 1990. *Foster* v. *Kassulke*, 898 F.2d 1144 (6th Cir. 1990).

order. (App. 1a-3a). A Petition for Rehearing was denied on September 3, 1992. (App. 4a).[2]

The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED

1. 42 U.S.C. §1983

STATEMENT OF THE CASE

Foster was convicted of five (5) counts of murder and received a death sentence on each count in April, 1987. She was received at the Kentucky Correctional Institution for Women [hereinafter "KCIW"] on May 11, 1987, and remained there until July 20, 1988, when she was transferred to the Mabel Bassett Correctional Center in Oklahoma [hereinafter "MBCC"] through the Interstate Compact.

In June, 1989, as a result of her suit against various Kentucky Corrections officials, the district court ruled after an evidentiary hearing that Foster, while housed in Oklahoma had been denied the effective assistance of her appointed counsel to prosecute her direct appeal because of

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[2]On December 19, 1991, Foster's murder convictions were upheld by the Kentucky Supreme Court, but the death sentences were reversed and remanded for a new trial in the penalty phase of the bifurcated state proceedings. *Foster* v. *Commonwealth*, Ky., 827 S.W.2d 670 (1991). This reversal and remand does not moot the questions presented. Foster still stands convicted of five (5) counts of murder. After sentencing the state desires to transfer Foster out-of-state (App. 2a, *see* ftn.1).

inadequate telephone contact with counsel. As a result, the district court entered a preliminary injunction ordering Foster's return to Kentucky until the completion of her direct appeal. (App.18a-31a). Corrections complied and did not challenge the 1989 preliminary injunction on appeal. Foster was returned to Kentucky on June 29, 1989.

In March, 1991, because the retention of Foster in Kentucky had continued to impose extraordinary administrative and security burdens on Corrections, a Federal Rule 60(b)(5) motion to lift the 1989 preliminary injunction was filed to allow her out-of-state transfer prior to oral argument. All appellate briefs on the direct appeal had been filed, and no further reason existed to keep Foster in the Commonwealth because Foster could not appear at the June 25, 1991 oral argument.

A memorandum in opposition joined with a motion for a permanent or modified injunction was then filed by Foster asking that she be kept in Kentucky during the pendency of any appeals she might file throughout the course of her incarceration. A three-day evidentiary hearing was conducted.

On June 19, 1991 the district court refused to lift the preliminary injunction, requiring Foster's presence in Kentucky until the conclusion of oral argument scheduled six days later.[3] The court then entered a permanent injunction directing Foster's return to Kentucky from any other state to which she may be transferred after oral argument, if her conviction was upheld and a denial of a petition for writ of certiorari by this Court was issued, in order to

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[3]The refusal to vacate the 1989 preliminary injunction is not an issue in this Petition.

exhaust all post-conviction appeals. In its memorandum opinion the district court stated as follows:

> The defendants have not carried their burden to prove that the resources available to Foster in Mabel Bassett are adequate to ensure access to the Kentucky courts. Therefore, we will order that Foster stay in Kentucky until oral arguments before the Kentucky Supreme Courts are concluded. Upon their conclusion, the Corrections Cabinet may return Foster to Oklahoma or to any other state which is a party to the Interstate Compact. If Foster's conviction is affirmed by the Kentucky Supreme Court and certiorari is denied by the United States Supreme Court, Foster must be returned to Kentucky within 48 hours after the date of the denial of the writ of certiorari in order to begin preparation of her Rule 11.42 motion, unless the Corrections Cabinet, by contractual agreement with Mabel Bassett officials, has provided adequately for Foster's access to the courts of Kentucky. (App. 12a).

The district court did not explain what it meant by providing "adequately for Foster's access."

At her criminal trial, Foster was represented by three attorneys provided by the Kentucky Department of Public Advocacy [hereinafter "DPA"]. *Foster* v. *Kassulke* 898 F.2d 1144 (6th Cir. 1990). On direct appeal, Foster was represented by two former "DPA" attorneys who also had been her trial counsel. For any subsequent post-conviction relief Ms. Foster would be assigned two attorneys from "DPA." (App. 9a).

At the 1991 evidentiary hearing, Corrections produced testimony that confining Foster in Kentucky had continued to impose the same and even more serious administrative and security problems than had existed initially in 1988. The district court did not determine that testimony to have been exaggerated. (App. 6a-9a).

In addition, Corrections produced Mr. Howard Ray, then Warden of "MBCC" in Oklahoma.[4] He testified that Oklahoma death row inmates, including Foster, may have access to unmonitored attorney phone calls in their restrictive housing unit merely by arranging such calls with the case manager. These phone calls are not limited in duration or frequency. As an alternative, Oklahoma death row inmates, including Foster, may arrange for a monitored attorney phone call from the case manager's office. Oklahoma death row inmates are not forced to choose between making attorney phone calls and recreation or shower time, as would be the procedure for inmate personal phone calls. Oklahoma death row inmates can always communicate confidentially through the mail with counsel. (App.32a-35a).

In light of this uncontroverted testimony, the district court committed clear error in its findings as to the operation of the Oklahoma telephone policy. This clear error was not addressed by the Sixth Circuit in its affirmance of the district court injunction.

Foster was present at the hearing, but did not testify. Foster's criminal trial and appellate counsel and counsel in this civil rights action, the Honorable Kevin McNally, testified about difficulties he had personally experienced in 1988, as well as his recollection of difficulties experienced by other counsel in 1988 as told to him.

On July 29, 1992, the Sixth Circuit affirmed the district court injunction requiring Foster's return from any out-of-state facility if the petition for writ of certiorari was de-

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[4]Ray was not Warden at "MBCC" in 1988 or 1989 and could not testify about Foster's telephone access to her appointed counsel at that time. (App. 7a)

nied. It characterized the injunction as a continuation of the 1989 preliminary injunction with modification. In effect, the court ruled that the state, by complying with and failing to challenge the 1989 preliminary injunction, could not challenge the merits of the 1991 injunction granted Foster. The Sixth Circuit accepted the reasoning of the district court, found no abuse of discretion by the district court, and concluded as follows:

> It is sufficient to simply state that Foster, who is facing the ultimate penalty, will obviously be irreparably harmed if the Kentucky officials do not insure that she has meaningful access to the Kentucky Courts, said access being feasible only through effective assistance furnished by her Kentucky counsel. (App. 3a).

The Petition for Rehearing was denied on September 3, 1992. This Petition now follows.

REASONS FOR GRANTING THE WRIT

I. The Sixth Circuit Opinion Penalizes State Corrections Officials for Fully Complying With and Not Challenging a Preliminary Injunction on Appeal.

The Sixth Circuit Court of Appeals mischaracterized the injunctive relief granted Foster as a modification of the 1989 preliminary injunction. Because the 1991 order was considered a modification, the Sixth Circuit ruled that the state, by failing to appeal from the preliminary injunction, could not now challenge the underlying merits. (App. 2a-3a). The 1989 preliminary injunction was a non-prospective injunction and was not modified. In 1991 Foster was granted a permanent injunction on her access to courts claim from which Corrections appealed.

On June 19, 1991, two orders were issued by the district court. In one order, the district court denied Corrections' Federal Rule 60(b)(5) motion to lift the 1989 preliminary injunction which had granted Foster immediate relief by ordering her presence in Kentucky until the completion of the direct appeal. Unlike most institutional reform injunctions, the 1989 preliminary injunction was not prospective in nature and expired by its own terms. The preliminary injunction was virtually satisfied by returning Foster to Kentucky for two years to pursue, with counsel, her direct appeal. The preliminary injunction terminated at the conclusion of oral argument heard six days after Corrections' motion was denied. The preliminary injunction was not subject to a modification at Foster's request pursuant to Federal Rule 60(b)(5). It was not executory and did not involve continual supervision by the court of changing conditions or circumstances. *Rufo* v. *Inmates of Suffolk County,* 112 S.Ct. 748 (1992); *Board of Education of Oklahoma City* v. *Dowell,* 111 S.Ct. 630 (1991); *United States* v. *Swift & Company,* 286 U.S. 106 (1932); *State of Pennsylvania* v. *Wheeling & Belmont Bridge Company,* 59 U.S. (18 How.) 421 (1856); *Schwartz* v. *U.S.* 976 F.2d 213 (4th Cir. 1992); *Twelve John Does* v. *District of Columbia,* 841 F.2d 1133 (D.C. Cir. 1988).

In the second 1991 order of the district court, Foster was granted permanent final injunctive relief requiring her return from any out-of-state facility for the exhaustion of any post-conviction appeal she may file. That order was not foreshadowed in the 1989 preliminary injunction and could not have been reasonably anticipated by Corrections so it should have known to appeal from the 1989 preliminary injunction.

It is necessary for this Court to define the concept of "prospective application" to clearly establish a principle

essential to institutional reform and prisoner rights litigation throughout the country. Otherwise, a state must engage in an attempt to anticipate all possible adverse orders that might arise and must appeal from an initial preliminary injunction to protect its future interests. The Sixth Circuit's mischaracterization of the permanent injunction as a modification punished Kentucky Corrections officials for declining to appeal from the preliminary injunction and complying with all its terms.

II. The Sixth Circuit Has Carved Out Exceptions to Clearly Established Principles Set Forth in *Bounds* v. *Smith* and *Olim* v. *Wakinekona* Solely on the Basis of a Sentence of Death, a Position Rejected in *Murray* v. *Giarratano*.

A. Holding Kentucky Corrections Officials Accountable for the Daily Management of an Oklahoma Penal Facility Extends the Principles of Due Process Beyond Constitutional Limits and Conflicts With Decisions of This Court, the Sixth Circuit and Other Circuits.

This Court has recognized that the interstate transfer of convicted felons could impose some hardships on inmates, including difficulty in making contact with counsel. *Olim* v. *Wakinekona*, 461 U.S. 238 (1983); *Meachum* v. *Fano*, 427 U.S. 215 *See* ftn.4. (1976). This difficulty in making contact with counsel has not been considered a reason to interfere with the daily management of prison operations which may require the interstate transfer of inmates for security or other administrative needs. The Sixth Circuit's imposition of a duty on Kentucky to develop an intimate operational knowledge of "MBCC", or, of any other out-of-state facility to which it might transfer Foster rejects the proposition that Oklahoma or any other state is equally bound to provide adequate access to Foster as an incarcer-

ated felon. Because Kentucky does not have oversight of the Oklahoma prison system or any other state prison system, it cannot be held accountable for their conditions, and should not have to prove the constitutionality of the conditions at those facilities before or after an interstate transfer occurs. *Logue* v. *United States*, 412 U.S. 521 (1973); *Black* v. *Wilson*, 838 F.2d 470 (6th Cir. 1988) [App. 36a-41a]; *Spurling* v. *Wigginton*, 907 F.2d 151 (6th Cir. 1990) [App. 42a-47a]; *Stewart* v. *McManus*, 924 F.2d 138 (8th Cir. 1991); *Johnson* v. *Barry*, 815 F.2d 1119 (7th Cir. 1987); *Cannon* v. *United States*, 645 F.2d 1128 (D.C. Cir. 1981); *Owens* v. *Haas*, 601 F.2d 1242 (2nd Cir. 1979), cert. den'd, 440 U.S. 980 (1980); *Henderson* v. *Thrower*, 497 F.2d 125 (5th Cir. 1974). *But see Rich* v. *Zitnay*, 644 F.2d 41 (1st Cir. 1981).

The constitutional duty of all Corrections officials is to provide all incarcerated persons with adequate access to courts with no set formula having been clearly established. *Bounds* v. *Smith*, 430 U.S. 817 (1977). Surely telephone and mail contact with appointed counsel can be adequate. *Olim, supra.* The sentence a person receives is not the measuring stick used to determine whether adequate access is provided. *Murray* v. *Giarratano*, 492 U.S. 1 (1989).

There is no question that Foster had more than adequate access to the Kentucky Courts. It was clearly established she had appointed counsel and would continue to have appointed counsel substantially experienced in death penalty litigation. In *Black* and *Spurling*, the Sixth Circuit affirmed the district court orders dismissing two pro se inmate civil right suits against Kentucky Corrections officials for unconstitutional conditions while residing in other states, Virginia and Oklahoma, respectively. Spurling's claims against Kentucky Corrections officials while in Oklahoma were almost identical to Foster's but for the

sentence of death. In fact, Spurling not only alleged difficulty in communicating with his counsel but alleged little or no access to Kentucky law books for personal research while in Oklahoma. In both *Black* and *Spurling* the Sixth Circuit agreed the conditions of confinement for inmates incarcerated out-of-state were not the responsibility of the Kentucky officials, but rested with the officials where the Kentucky inmate resided. The Sixth Circuit failed to distinguish its reasoning and results in *Black* and *Spurling* from the Foster opinion.

The Sixth Circuit was unduly influenced by Foster's death sentence and based its decision on an erroneous assessment of the daily phone procedures in Oklahoma while totally disregarding Foster's ability to communicate through the United States mail with her counsel while in Oklahoma or any other state. Foster's access to the courts while out-of-state rests with the receiving state. Kentucky does not have an oversight responsibility for any system but its own.

B. The Sixth Circuit Has Effectively Prohibited the Interstate Transfer of Any Death-row Inmate Because of the Lack of Personal Access to Counsel.

Clearly, the Sixth Circuit has created an exception to this Court's decisions on inmate transfers, adequate access to courts and liability for conditions of confinement by imposing unreasonable duties on the sending state when an inmate is transferred to another state. By virtue of its order Kentucky cannot transfer Foster out-of-state because she will not have personal contact with her counsel. Phone and mail contact apparently is inadequate and not meaningful.

The Sixth Circuit was unduly influenced by the fact that Foster is facing five death sentences. Giving such

weight to a conviction when assessing Eighth Amendment and Due Process claims has been rejected by this Court. *Murray* v. *Giarratano, supra.* This Court refused to agree that the imposition of a death sentence is crucial in determining whether additional safeguards are imposed or should be imposed.

Contrary to the facts in *Murray,* Foster will have appointed counsel for her discretionary appeal. Thus, the exception by the Sixth Circuit becomes even more disturbing. In *Murray,* this Court examined the principles established in *Bounds,* with respect to adequate access to counsel and its relationship with any right to counsel for an indigent death-row prisoner. The Court concluded the following:

> It would be an even stranger jurisprudence to allow, as the dissent would, the "right of access" involved in *Bounds* v. *Smith, supra,* to partially overrule *Pennsylvania* v. *Finley,* based on "factual" findings of a particular District Court regarding matters such as the perceived difficulty of capital sentencing law and the general psychology of death-row inmates. Treating such matters as "factual findings," presumably subject only to review under the "clearly erroneous" standard, would permit a different constitutional rule to apply in a different State if the district judge hearing that claim reached different conclusions. Our cases involving the right of counsel have never taken this tack; they have been categorical holdings as to what the Constitution requires with respect to a particular stage of criminal proceedings in general. (citations omitted) . . . For the reasons previously stated in this opinion, we now hold that *Finley* applies to those inmates under sentence of death as well as to other inmates, and that holdings necessarily imposes limits on *Bounds.*

Murray, supra at 11-12. Contrary to this Court's opinion in *Murray, Meachum, Bounds* and *Olim,* as well as other

Circuit Court opinions and the Sixth Circuit's own opinions in *Black* and *Spurling*, the court has given Foster, a death-row inmate, a special status not previously recognized. The Sixth Circuit has in effect concluded that because Foster is a death-row inmate she should be treated differently from all other convicted felons with respect to her conditions of confinement in other states.

The lower court imposed an improper burden on Kentucky to demonstrate that the permanent injunction should not be entered rather than imposing the burden on Foster to demonstrate that the injunction should be granted. The Sixth Circuit has failed to recognize Foster has an adequate remedy in the courts of any receiving state should she be denied adequate phone and mail access to her counsel in the state of her conviction.

CONCLUSION

Kentucky Corrections administrators urge this Court to consider the ramifications of this decision and the possible effect on all Correctional administrators who transfer inmates through the Interstate Compact in response to their administrative and security needs. It is important for this Court to review this decision in order to provide guidance to state prison administrators, as to whether they shall be held accountable for conditions in facilities over which they have no control and whether they must challenge all preliminary adverse rulings to protect their interest throughout the course of lengthy and sometimes complex litigation.

THEREFORE, Petitioners request that a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

NOT FOR PUBLICATION

No. 91-5851

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BETTY KASSULKE, et al., - - *Defendant-Appellant*

v.

LAFONDA FAY FOSTER, - - - - *Plaintiff-Appellee*

On Appeal From the United States District Court for the Western District of Kentucky

OPINION—Filed July 29, 1992

BEFORE: MILBURN and NELSON, Circuit Judges; and HOOD, District Judge.*

PER CURIAM. This is an appeal from a decision of the district court refusing to lift a preliminary injunction. For the reasons which follow, we affirm.

I.

Lafonda Fay Foster [Foster] brought an action for damages, injunctive relief and a declaratory judgment against various Kentucky penal officials under 42 U.S.C. § 1983. She alleged, among other things, that due to her confine-

*The Honorable Joseph M. Hood, United States District Judge for the Eastern District of Kentucky, sitting by designation.

ment in Oklahoma she was being denied the effective assistance of counsel in the prosecution of her direct appeal of the death sentence she received in a Kentucky court. On June 7, 1989, the district court issued an order directing that Foster be returned to Kentucky and that she be confined in Kentucky until completion of her direct appeal to the Supreme Court of Kentucky. [Joint Appendix, [J.A.] pp. 51-66]. No appeal was taken from the district court's June 7 order.

On March 29, 1991, the Kentucky Corrections officials moved to lift the injunction. [J.A., pp. 84-92]. After a hearing, the district court declined to grant the motion. [J.A., pp. 94-109]. Instead, it modified the previous injunction, directing that:

> . . . the plaintiff remain in Kentucky until the conclusion of arguments before the Kentucky Supreme Court. If her conviction is affirmed and certiorari is denied by the United States Supreme Court, plaintiff shall be returned to Kentucky within forty-eight (48) hours after the date of the denial of the writ of certiorari to begin preparation of post-conviction appeals.[1]

[J.A., p. 109]. This appeal followed.

II.

Because the Kentucky officials did not appeal from the grant of the preliminary injunction, the general rule is that they cannot now challenge the merits of the underlying injunction. *Cerro Metal Products* v. *Marshall*, 620 F.2d

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[1]Foster was granted a new trial on the penalty phase of the bifurcated state proceedings by the Supreme Court of Kentucky on December 19, 1991. This action does not moot the questions presented here. Appellants' counsel candidly admitted during oral argument that if Foster was sentenced to death at her new trial she would again be transferred to the Oklahoma prison.

964, 972 (3rd Cir. 1980); *See, Merrell-Nat'l Labs., Inc.* v. *Zenith Labs., Inc.*, 579 F.2d 786, 791 (3rd Cir. 1978). Rather, review should be confined to the propriety of refusing to vacate or modify it; the inquiry should be whether the Kentucky officials have demonstrated that changed circumstances make the continuation of the injunction inequitable. *Winterland Concessions Co.* v. *Trela*, 735 F.2d 257, 260 (7th Cir. 1984).

Having had the benefit of oral argument, and having carefully considered the record on appeal and the briefs of the parties, we are unable to say that the district court abused its discretion when it refused to lift the preliminary injunction it issued in 1989. Moreover, as the reasons why the preliminary injunction should not be lifted have been articulated by the district court, there is no reason for this court to issue an extensive written opinion. It is sufficient to simply state that Foster, who is facing the ultimate penalty, will obviously be irreparably harmed if the Kentucky officials do not insure that she has meaningful access to the Kentucky courts, said access being feasible only through effective assistance furnished by her Kentucky counsel.

III.

For the foregoing reasons, we AFFIRM the decision of the late Chief United States District Judge Thomas A. Ballantine, Jr.

Issued as Mandate: 9/14/92

A True Copy
Attest:
Leonard Green, Clerk
By: /s/ Diane Schnur
Deputy Clerk

No. 91-5851

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LAFONDA FAY FOSTER, - - - - - *Plaintiff-Appellee,*

v.

BETTY KASSULKE, Warden, et al., - *Defendants-Appellants.*

ORDER—Filed September 3, 1992

BEFORE: MILBURN and NELSON, Circuit Judges; and HOOD,* United States District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green
Leonard Green, Clerk

*Hon. Joseph M. Hood sitting by designation from the Eastern District of Kentucky.

No. C 89-0160-L(B)

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

LAFONDA FAY FOSTER - - - - - - - - - *Plaintiff*

v.

BETTY KASSULKE, et al. - - - - - - *Defendants*

MEMORANDUM—Filed June 19, 1991

This matter is before the Court on the motion of the defendants to lift the preliminary injunction granted by the Court's Order of June 7, 1989. The plaintiff, LaFonda Fay Foster, is a prisoner, convicted and sentenced to death in the Fayette County Circuit Court in April of 1987. The Order, issued after a hearing, allowed Foster to return to Kentucky from the State of Oklahoma where she had been housed in the Mabel Bassett Correctional Center and to stay in Kentucky during the pendency of her direct appeal. The Court's Order was based on the determination that Foster's right to consult with her Kentucky attorneys was impaired as a result of her incarceration in Oklahoma.[1] *Meachum* v. *Fano,* 427 U.S. 215, 96 S.Ct. 2532 (1976); *Montanye* v. *Haymes,* 427 U.S. 236, 96 S.Ct. 2543 (1976).

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[1]While in Oklahoma, Foster was unable to view her trial transcript or have regular or confidential communications with her lawyers.

Oral arguments concerning the merits of Foster's direct appeal will be heard before the Kentucky Supreme Court on June 25, 1991. Foster has moved for a "permanent and/or modified injunction" to allow her to remain incarcerated in Kentucky until all post-conviction appeals have been exhausted or until her death sentence is overturned. Plaintiff also asks for a preliminary injunction to require the defendants to house her under conditions comparable to those experienced by men in the special security unit (death row) at Kentucky State Penitentiary (KSP), Kentucky's only maximum security institution, and she has filed a motion for summary judgment on her complaint alleging sex discrimination in the conditions of her confinement. In addition, Foster has moved for attorneys' fees.

Once returned to Kentucky on June 29, 1989, Foster was housed at the Kentucky Correctional Institution for Women (KCIW) until March 24, 1990 when she was transferred to Northpoint Training Center, a medium security prison for men, because of renovation at KCIW.[2] On October 25, 1990, Foster was transferred back to KCIW, but returned to Northpoint on October 31, 1990 because of prison-wide construction at KCIW.

At a hearing held on the above motions, May 29th through May 31st, 1991, Betty Kassaulke, Warden at KCIW, testified that in 1987, Foster was housed in the special management unit at KCIW which contained nine segregated cells used mainly to manage prisoners for disciplinary purposes. She testified that Foster's use of one of the cells, coupled with increased population at KCIW, reduced KCIW's ability to carry out disciplinary segregation and KCIW was then forced to rely on male institutions to house such prisoners. Kassaulke also testified that Foster

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[2]All women offenders are classified to KCIW on the basis of gender.

was considered a danger to the prison staff and other inmates. Kassaulke testified that should Foster be again transferred out of Kentucky, she would be under the jurisdiction of the Kentucky Corrections Cabinet and therefore returned to Kentucky for purposes of parole or execution. On cross-examination, Kassaulke acknowledged that she understood an inmate's need to "see an attorney." She testified that she would not bring Foster back to consult with her attorneys unless ordered by the Court and that she assumed from the fact that Mabel Bassett is accredited that it "is doing all it is supposed to do." Kassaulke admitted that Foster did not have any serious disciplinary problems when housed most recently at KCIW and that Foster could either be managed at KCIW, at additional expense to the institution, or other options could be found in Kentucky to comply with a Court order that Foster stay in the Commonwealth.

Howard Ray, the Warden at Mabel Bassett as of January, 1990, testified as to the conditions of confinement at Mabel Bassett. Ray did not have personal knowledge of problems Foster experienced in contacting her attorneys during her incarceration at Mabel Bassett. He introduced a memorandum from Foster's former Case Manager, W. Gail Enochs, which indicates only that Foster received "only one misconduct" for refusal to "lock down" after being unable to reach her attorney by telephone and relates Enochs opinion that Foster is "dangerous" and "manipulative." (Defendants Exhibit 1). Ray also introduced an Oklahoma Department of Corrections Field Memorandum which contains certain policies and procedures relating to restrictive housing, which is the unit on which Foster would be housed should she be returned to Oklahoma. Under "Telephone Privileges," the policy states, in part:

> All restrictive housing unit inmates, with the exception of Disciplinary Segregation, are allowed two blocks of phone time per week, not to exceed fifteen minutes

per block. Unlimited calls may be placed during the fifteen minute time limit. Phone time must be taken in blocks of fifteen minutes and not distributed over a period of time. Phone time shall be used concurrently with shower time.

(1) Requests to place phone calls to attorneys shall be made in writing twenty-four hours in advance to the 8-4 RHU officer, unless special circumstances exist.

As part of the same exhibit, Ray introduced a separate telephone policy which specifically exempts death row inmates from its application. The policy states, "Unmonitored calls to the inmate's attorney of record may be arranged through the inmate's case manager." Obviously, this latter policy would not apply to Foster should she be housed at Mabel Bassett.

Steve Berry, Deputy Warden at Kentucky State Reformatory and former Classification Manager for the Corrections Cabinet, testified that the Warden at KSP adopted a "more liberal approach" in housing death row prisoners during late 1985 or early 1986, when the prisons were experiencing overcrowding, and it was likely that KCIW would be required to offer comparable housing for death row women in Kentucky. He testified that those circumstances compelled him to initiate negotiations with other states for Foster's housing.

Glenn Haeberlin, Deputy Warden for Security at KSP, testified as to the conditions of death row inmates at KSP and the security necessary at KSP to effectuate those conditions. He testified that KCIW is not as secure as KSP and if the same conditions of imprisonment were implemented at KCIW, the perimeter would have to be redesigned.

Donald L. Shepherd, the Correctional Unit Supervisor II, at Northpoint in the special maximum security housing unit, testified that Foster had been a "special security-classed inmate" (death row inmate) at Northpoint since

March, 1990, except for one ten-day period spent at KCIW. He testified that her restrictions were similar to those of inmates in disciplinary segregation and that the few privileges she was accorded caused resentment among the female inmates sent to Northpoint from KCIW for disciplinary purposes.[3] Shepherd introduced copies of correspondence indicating that Foster had passed cigarettes, a striker and matches to other inmates. (Defendants' Exh. 13, 14 and 15).

Elizabeth Chandler, Deputy Warden for Programs at KCIW; introduced the KCIW Policies and Procedures for Special Security Inmates, issued January 9, 1988, and testified that the policy was "as comparable to [KSP's] death row as KCIW could make it." Chandler testified that Tina Powell, Foster's codefendant was housed with the general prison population, but KCIW determined that it could not confine Powell in the same secured unit as Foster for disciplinary purposes because of perceived conflict between Powell and Foster. Kassaulke approved Foster's transfer form in June, 1987. Chandler testified that Foster had conflicts with three inmates.

Tim Riddell, Manager of the Appellate Branch of the Department of Public Advocacy (DPA), testified that his office is required by statute to provide indigent clients with effective assistance of counsel in their appeals. He stated that if the Kentucky Supreme Court affirms Powell's conviction, her next step would be to file a writ of certiorari to the United States Supreme Court. He testified that if certiorari is denied, she would be assigned two new attorneys who would then have forty-five days to file a Rule

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[3]Evidently Foster was granted some privileges due to her "permanent" residency in maximum security. Other females housed in the unit were sent to Northpoint only for short periods of time as punishment for disciplinary infractions.

11.42 motion in the Fayette County Circuit Court or the governor would sign her death warrant. Riddell testified that his office is hampered in its representation of death row inmates by understaffing, strict time limits for filing of pleadings, huge records and complex issues.

Randell Wheeler, Director of the Kentucky Capital Litigation Resource Center which provides representation to death row inmates and advises attorneys who represent such prisoners, testified that the payment cap of $2500 is a disincentive to attorneys who might otherwise be willing to practice a death penalty case. He testified that it is important for an attorney to develop a relationship with a client over time.

Kevin McNally who has represented Foster throughout her trial and direct appeal, testified that he and his co-counsel, Neal Walker, experienced numerous difficulties in speaking with Foster on the telephone while she was at Mabel Bassett and on the occasions when telephone contact was made, the calls were monitored by prison staff.[4]

THE RIGHT OF ACCESS TO THE COURTS

As discussed in the Court's Memorandum Opinion of June 7, 1989, the need of prison administrators to maintain security and preserve discipline may require some limitation of the constitutional right retained by prisoners. *Bell* v. *Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). The transfer of a prisoner to achieve the administrators' goals is permissible only if "the conditions of the confinement do not otherwise violate the Constitution." *Fano*, 427 U.S. at 224, 96 S.Ct. at 2538; *accord*, *Haymes*, 427 U.S. at 242, 96 S.Ct. at 2547 and *Olim* v. *Wakinekona*, 461 U.S. 238, 103 S.Ct. 1741, 75 L.Ed.2d 813 (1983).

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[4]Neal Walker testified similarly at the preliminary injunction hearing on March 7, 1989.

Access to the courts is a fundamental constitutional right. *Cruz* v. *Hauck*, 475 F.2d 475, 476 (5th Cir. 1973); *accord*, *Johnson-El* v. *Schoemehl*, 878 F.2d 1043 (8th Cir. 1989). *See also*, *Adams* v. *Carlson*, 488 F.2d 619, 630 (7th Cir. 1973) ("All other rights of an inmate are illusory without it. . . ."). Courts have long required prison authorities to assist prisoners in the preparation and filing of meaningful legal papers by providing access to adequate law libraries or adequate assistance from persons trained in the law. *Bounds* v. *Smith*, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977); *Wolff* v. *McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 934 (1974); *Johnson* v. *Avery*, 393 U.S. 483, 89 S.Ct. 747, 21 L.Ed.2d 718 (1969); *Ex Parte Hull*, 312 U.S. 546, 61 S.Ct. 640 (1941); *Patterson* v. *Mintzes*, 717 F.2d 284, 288 (6th Cir. 1983) (Prison officials are charged with the responsibility of assuring that an inmate's access is adequate, effective and meaningful).

Allegations concerning denial of access to courts by prisoners transferred by contractual agreement either from state to federal institutions or from an institution in one state to an institution in another state are recognized as valid claims under Title 42 U.S.C. Section 1983. A majority of federal courts have held that the authorities in the sending state are responsible for ensuring that their prisoners receive adequate access to the courts in the state of conviction while incarcerated in the receiving state. *Rich* v. *Zitnay*, 644 F.2d 41 (1st Cir. 1981); *Messere* v. *Fair*, 752 F.Supp. 48 (D.Mass. 1990); *Hohman* v. *Hogan*, 458 F.Supp. 669 (D.Vt. 1978); *Hudson* v. *Israel*, 594 F.Supp. 664 (E.D. Wisc. 1984); *Blake* v. *Berman*, 625 F.Supp. 1523 (D.Mass. 1986); *Benjamin* v. *Potter*, 635 F.Supp. 243 (D.Virgin Islands 1986), aff'd 838 F.2d 1205 (3rd Cir. 1988).[5]

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[5]Mabel Bassett does not provide Kentucky lawbooks in its library nor is there evidence that Mabel Bassett or the State of Oklahoma provides professional or quasi-professional legal assistance to Kentucky prisoners housed there.

In *Rich*, where the appellant prisoners were transferred from Maine to Leavenworth, Kansas, the court stated:

> Here it is the Maine state courts to which appellants seek meaningful access. A federal court, in fashioning relief to insure such access, might necessarily have to call on Maine rather than Leavenworth authorities to supply professionals trained in Maine criminal law. Or the most ready sources of pertinent legal research materials may be found only in Maine. In view of the likelihood that Maine officials will necessarily have to play a role in the remedy and because of the fundamental nature of the right involved, we think that Maine authorities may not wash their hands of their obligation to insure access to Maine courts simply by transferring a prisoner out of state; *See Inmates of Suffolk County Jail* v. *Eisenstadt*, 494 F.2d 1196, 1198-99 (1st Cir.), cert. denied, 419 U.S. 977, 95 S.Ct. 239, 42 L.Ed.2d 189 (1974).

Id. at 43.

The defendants have not carried their burden to prove that the resources available to Foster in Mabel Bassett are adequate to ensure access to the Kentucky courts. Therefore, we will order that Foster stay in Kentucky until oral arguments before the Kentucky Supreme Courts are concluded. Upon their conclusion, the Corrections Cabinet may return Foster to Oklahoma or to any other state which is a party in the Interstate Compact. If Foster's conviction is affirmed by the Kentucky Supreme Court and certiorari is denied by the United States Supreme Court, Foster must be returned to Kentucky within 48 hours after the date of the denial of the writ of certiorari in order to begin preparation of her Rule 11.42 motion, unless the Corrections Cabinet, by contractual agreement with Mabel Bassett officials, has provided adequately for Foster's access to the courts of Kentucky. If Foster's conviction is overturned by

the Kentucky Supreme Court and she wishes to pursue further relief in the Kentucky courts, her remedy would be to file a separate action against the defendants under Title 42 U.S.C. Section 1983.

DISCRIMINATION

Foster has alleged that the defendants have violated her constitutional rights to equal protection, due process and the right to be free from cruel and unusual punishment in the conditions of her confinement in Kentucky and in her transfer to Mabel Bassett. Foster has also alleged that she has been transferred in retaliation for her exercise of free speech in protesting the conditions of her confinement in Kentucky. The record shows that men prisoners sentenced to death are afforded privileges such as eating as a group in KSP's cafeteria, recreating together (at times participating in sports with correctional staff and attorneys), holding jobs, use of the prison library and legal office and availability of academic credits. In contrast, Foster has been held in segregation at Northpoint for the majority of the time she has been in Kentucky prisons. Because of the temporary nature of her placement at Northpoint, the Court will deny Foster's motion for a preliminary injunction requiring Kentucky to provide Foster with comparable conditions of confinement as those experienced by death-sentenced men at the KSP. We will, however, address the merits of Foster's motion for summary judgment on her civil rights claim as it pertains to her transfer and to her recent confinement in Northpoint.

While there is some evidence in the record that Foster complained about the conditions of her confinement in KCIW and at Northpoint, the evidence is uncontroverted that Foster's transfer to an out-of-state womens' prison which houses death row inmates was in the process of negotiation before she was sentenced, due to the difficulty of housing a death-row inmate in a medium security prison.

Therefore, we must deny the plaintiff's motion for summary judgment as it pertains to Foster's claim of retaliatory transfer.

Lawful incarceration involves the restriction of many privileges and rights. *Hudson* v. *Palmer,* 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984). Fundamental constitutional rights may also be restricted, but only if such restriction is necessary to achieve legitimate correctional goals and to maintain institutional security. *Bell* v. *Wolfish, supra.* However, prison restrictions that affect an inmate's constitutional rights must be carefully scrutinized "to ascertain the extent to which they are necessary to effectuate the legitimate policies and goals of the corrections system." *Childs* v. *Duckworth,* 705 F.2d 915 (7th Cir. 1983). Economic considerations alone are not an excuse for failure to meet constitutional standards. *Gates* v. *Collier,* 501 F.2d 1291, 1319-20 (5th Cir. 1974).

Defendants argue that prison officials are accorded wide-ranging deference in adopting policies that are needed to preserve internal order and security. *Hewitt* v. *Helms,* 459 U.S. 460, 474, 103 S.Ct. 864, 872-73, 74 L.Ed.2d 675 (1983). But that deference does not extend to gender-based distinctions which are not reasonably adapted to important correctional goals.

From the time of her conviction, Foster has been the only woman housed in Kentucky under a sentence of death. The record shows that many privileges accorded to male death row prisoners at KSP have been denied to Foster.

The plaintiff alleges that the defendants are in violation of *Canterino* v. *Wilson,* 546 F.Supp. 174 (W.D. Ky 1982), vacated and remanded 869 F.2d 948 (6th Cir. 1989), in which the Court found that women prisoners at KCIW were denied equal protection and due process because they were treated less favorably than similarly situated male prisoners at other Kentucky institutions in the granting of

privileges, vocational education, conditions of confinement, medical care, recreation, disciplinary and grievance procedures, access to courts, provision of personal hygiene supplies, and eligibility for study or work release, and such deprivations bore no reasonable relation to valid correctional concerns or to the purpose for which the women were confined. *Caterino* was decided after a four week trial, in which numerous correctional and behavioral experts offered opinions, submission of post trial briefs and oral arguments. The plaintiff has now asked this Court for summary judgment based on a hearing on a motion to lift a preliminary injunction and the record as it stands. No expert testimony has been offered. We have been presented with evidence that KCIW is not as secure as KSP, that Foster was moved to Northpoint because of lack of cell space at KCIW due to construction and that Northpoint's facilities for women are restricted to segregation cells. We heard testimony that Foster has behaved relatively well at Northpoint and KCIW. We saw exhibits which stated she was not dangerous to herself or others and that she was cooperative, yet heard testimony from KCIW administrators that she was manipulative and dangerous based on the crime she committed, notes found in her cell, and an incident in which she threw feces on another prisoner.

Plaintiff has asserted that she has suffered unlawful discrimination in the conditions of her confinement because she has been treated less favorably than death-sentenced men at KSP. But it is not enough to show that certain privileges available to a group of male prisoners at one institution is not offered to a single woman prisoner at another.

For example, classification by gender is permissible when it pertains to the choice of institution to which a prisoner must be assigned. The plaintiff has failed to present any evidence to rebut the defendants' legitimate

policy reasons for Foster's presence at Northpoint during construction at KCIW. Warden Kassaulke testified that KCIW will be able to manage Foster's incarceration when she is returned to prepare post-conviction appeals.

As discussed in the Court's Memorandum Opinion of June 7, 1989, a prisoner has no protected right against transfer. *Olim* v. *Wakinekona*, 461 U.S. 238, 103 S.Ct. 1741 (1983). We find no gender-based discrimination in the conditions of Foster's confinement at Mabel Bassett.

The motion of the plaintiff for summary judgment on the issue of discrimination will be denied.

ATTORNEYS FEES

Defendants' motion for an extension of time to file a response to plaintiffs' motion for an award of attorneys' fees will be granted and the issue will be addressed by the Court in a subsequent opinion.

An appropriate order has been entered this 18th day of June, 1991.

/s/ Thomas A. Ballantine, Jr.
Thomas A. Ballantine, Jr.
Chief Judge, U.S. District Court

Copies to counsel

No. C 89-0160-L(B)

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

LAFONDA FAY FOSTER - - - - - - - - *Plaintiff*

v.

BETTY KASSULKE, et al. - - - - - - *Defendants*

ORDER—Entered June 19, 1991

For the reasons set forth in the memorandum filed this date,

IT IS ORDERED that the plaintiff remain in Kentucky until the conclusion of arguments before the Kentucky Supreme Court. If her conviction is affirmed and certiorari is denied by the United States Supreme Court, plaintiff shall be returned to Kentucky within forty-eight (48) hours after the date of the denial of the writ of certiorari to begin preparation of post-conviction appeals.

IT IS FURTHER ORDERED that the motion of the plaintiff for summary judgment against the defendants on the issue of discrimination be and it hereby is denied.

IT IS FURTHER ORDERED that the motion of the defendants for an extension of time to file a response to plaintiff's motion for attorneys' fees be and it hereby is granted.

This is not a final order.

This 18th day of June, 1991.

/s/ Thomas A. Ballantine, Jr.
Thomas A. Ballantine, Jr.
Chief Judge, U.S. District Court

Copies to Counsel

No. C 89-0160-L(B)

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

LAFONDA FAY FOSTER - - - - - - - - *Plaintiff*

v.

BETTY KASSULKE, et al. - - - - - - *Defendants*

MEMORANDUM—Entered June 7, 1989

Plaintiff commenced this action seeking damages, injunctive relief, and a declaratory judgment against institutional personnel at the Kentucky Correctional Institution for Women (KCIW), the Secretary of the Corrections Cabinet of the Commonwealth, two members of the Department of Public Advocacy, and the Chief Justice and Justices of the Supreme Court of Kentucky.

BACKGROUND

On April 28, 1987, plaintiff was convicted in the Fayette Circuit Court of five counts of murder. She received a death sentence on each count. From May 11, 1987, until July 20, 1988, she was confined at KCIW. On July 20, 1988, she was transferred to an institution in Oklahoma.

Plaintiff's complaint challenges the conditions of her confinement and her transfer, the limitation of $2500.00 on the compensation of her court-appointed counsel, and the refusal of the justices of the Supreme Court to order preparation of a written transcript of her videotaped trial which extended over six weeks.

The Court will address the arguments in what we perceive to be a logical order.

1. Conditions of Confinement and Transfer

KCIW is the only facility in Kentucky for the confinement of female inmates. Not surprisingly, in light of the rarity of death sentences against female defendants, it has no separate death row.

Upon her arrival at KCIW, plaintiff was lodged in a unit reserved for inmates in segregation. She was not permitted to hold a job and her activities were severely restricted and closely monitored. Although she complains that her visits with her counsel were under circumstances which caused interruptions by traffic through the area, she does not suggest that there was any time or frequency restriction placed on those visits and she concedes that she had adequate and confidential telephone communication with her attorneys.

Plaintiff's complaints address her confinement in segregation, where she alleges she was harassed by other inmates who were either mentally unbalanced or were disciplinary problems.

Plaintiff alleges that when she and her counsel complained of the disparate treatment she received at KCIW compared with that of male death row inmates, she was told that she would be transferred to an institution in Oklahoma which had a female death row. The transfer was effected and plaintiff asserts that it was effected in retaliation for her exercise of her right of free speech in complaining about her confinement.

For the present, we will not address the matter of disparate treatment of male and female death row inmates. That issue is not of pressing concern except as it affects the allegation of retaliatory transfer.

Of greater concern to the Court is whether the transfer deprives plaintiff of the effective assistance of counsel in prosecuting her appeal.

It is well settled that a state prisoner does not have a liberty interest which entitles him or her to a due process hearing before the inmate is transferred to another institution. *Meachum* v. *Fano,* 427 U.S. 215, 96 S.Ct. 2532 (1976); *Montanye* v. *Haymes,* 427 U.S. 236, 96 S.Ct. 2543 (1976).

Kentucky places no restriction on the discretion of the Secretary of the Corrections Cabinet in ordering the transfer of prisoners, KRS 197.065(2) and KRS 196.070(5), and therefore a prisoner has no protected right against transfer. See *Olim* v. *Wakinekona,* 461 U.S. 238, 103 S.Ct. 1741 (1983).

In the case *sub judice,* it cannot be seriously argued that an 800-mile separation between plaintiff and her counsel is not an impediment to effective representation. Nor can it be asserted that plaintiff has no right to the effective assistance of counsel on appeal, including her right to participate in the prosecution of her appeal by consulting with her counsel. *Evitts* v. *Lucey,* 469 U.S. 387, 105 S.Ct. 830 (1985).

In *Evitts,* the Court addressed the Sixth Amendment right to the effective assistance of counsel on appeal:

> "A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney. This result is hardly novel. The petitioners in both *Anders* v. *California,* 386 U.S. 738, 87 S.Ct. 1396, 18 L.ed.2d 493 (1967), and *Entsminger* v. *Iowa,* 386 U.S. 748, 87 S.Ct. 1402, 18 L.Ed.2d 501 (1967), claimed that, although represented in name by counsel, they had not received the type of assistance constitutionally required to render the appellate proceedings fair. In both cases, we agreed with the petitioners, holding that counsel's failure in *Anders* to submit a brief on appeal and counsel's waiver in *Entsminger* of the

> petitioner's right to a full transcript rendered the subsequent judgments against the petitioners unconstitutional. In short, the promise of *Douglas* [v. *California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963)] that a criminal defendant has a right to counsel on appeal . . . would be a futile gesture unless it comprehended the right to the effective assistance of counsel."

469 U.S. 386, 105 S.Ct. at 836.

Whether or not the transfer to Oklahoma was retaliatory, the result is that plaintiff is deprived of her right to consult with her attorney.

Over half a century ago, the Supreme Court recognized that "the right to the aid of counsel is of this [constitutionally guaranteed] fundamental character." *Powell* v. *Alabama*, 287 U.S. 45, 68, 53 S.Ct. 55, 63 (1932). This guarantee was reaffirmed and strengthened in *Gideon* v. *Wainwright*, 372 U.S. 335, 83 S.Ct. 792 (1963).

Prison administrators are afforded considerable latitude in their decisions to transfer prisoners from one institution to another. *Fano, supra*, 427 U.S. 215, 96 S.Ct. 2532, 49 L.Ed.2d 451; *Haymes, supra*, 427 U.S. 236, 96 S.Ct. 2543, 49 L.Ed.2d 466. Maintaining the security of the penal institution and preserving discipline are essential goals that may require limitation of the constitutional rights which convicted prisoners retain. *Bell* v. *Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). Where a state prison is involved, "federal courts have a further reason for deference to the appropriate prison authorities." *Procunier* v. *Martinez*, 416 U.S. 396, 405, 94 S.Ct. 1800, 1807, 40 L.Ed.2d 224 (1974).

The Supreme Court's decisions in *Fano* and *Haymes* were limited in one important aspect, however. Although the Court settled the question of whether the transfer of a prisoner to less favorable conditions in and of itself violates any constitutional rights, a transfer was deemed to be per-

missible "so long as the conditions of the confinement do not otherwise violate the Constitution." *Fano*, 427 U.S. at 224, 96 S.Ct. at 2538; *accord*, *Haymes*, 427 U.S. at 242, 96 S.Ct. at 2547. An inmate's opportunity to confer with counsel is a constitutional right of particular importance which the courts should not allow to be unnecessarily abridged. *See, Dreher* v. *Sielaff*, 636 F.2d 1141 (7th Cir. 1980). The discretion given to prison administrators in transfer decisions does not engulf plaintiff's fundamental right to aid of counsel. Moreover, it is apparent that in plaintiff's case, her transfer to Oklahoma so interferes with her ability to communicate with her appellate counsel that under these circumstances it rises to the level of a constitutional deprivation. Plaintiff has shown significantly more than mere inconvenience; her almost complete inability to communicate with her attorneys amounts to a denial of the right to counsel.

Even assuming that defendants' transfer of plaintiff to Oklahoma was not in retaliation for her complaints regarding the disparate conditions of her confinement, the reasons offered by defendants to support the transfer do not establish "a substantial legitimate need for the transfer which outweighs the chilling effect it will have on plaintiff's [Sixth] Amendment right." *Laaman* v. *Perrin*, 435 F.Supp. 319 (D.N.H. 1977).

Although this Court is reluctant to interfere with the internal administration of a state prison, it is compelled to intervene where a paramount federal constitutional right is involved. *See, Jones* v. *Metzger*, 456 F.2d 854 (6th Cir. 1972). As the Supreme Court has noted in another context:

> Once a right and violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.

Swann v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15, 91 S.Ct. 1267, 1276, 28 L.Ed.2d 554 (1971). Given the ongoing violation of plaintiff's Sixth Amendment right to assistance of counsel caused by her incarceration in Oklahoma, plaintiff's request for injunctive relief must be granted. Plaintiff shall be returned to KCIW until the completion of her appellate brief and oral arguments are heard in her appeal.

2. Challenge to the Compensation of the Court-Appointed Attorney

Defendants Paul Isaacs and David Norat are agents of the Department of Public Advocacy (DPA), an agency established by Chapter 31 KRS. Plaintiff's defense of the criminal charges and the initial stages of her appeal and some other post-trial proceedings were handled by Kevin McNally and Neal Walker, who at the time were full-time staff attorneys of DPA.

McNally resigned from DPA in August, 1988. Isaacs and Norat agreed to compensate McNally and Gail Robinson[1] at an agreed hourly rate with no "cap" on the total compensation for representing plaintiff on appeal. Later Isaacs amended the agreement by placing a $2500.00 plus expenses "cap" on McNally's compensation. McNally then went to the Supreme Court of Kentucky with a request either to be relieved as appellate counsel for plaintiff or for an order that he be compensated in an amount in excess of $2500.00. Both of these requests were denied by the Court.

The threshold, and we believe dispositive, matter to be addressed is whether plaintiff has standing to assert the claim on behalf of McNally.

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[1]McNally and Robinson are plaintiff's counsel in this action.

We recognize that the concept of Article III standing does not admit of easy definition. In *Valley Forge, Etc.* v. *Americans United, Etc.*, 454 U.S. 464, 102 S.Ct. 752 (1982), the Court addressed the difficulty in determining standing:

> "The requirements of Art. III are not satisfied merely because a party requests a court of the United States to declare its legal rights, and has couched that request for forms of relief historically associated with courts of law in terms that have a familiar ring to those trained in the legal process. The judicial power of the United States defined by Art. III is not an unconditioned authority to determine the constitutionality of legislative or executive acts. The power to declare the rights of individuals and to measure the authority of governments, this Court said 90 years ago, 'is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy.' *Chicago & Grand Trunk R. Co.* v. *Wellman*, 143 U.S. 339, 345, 12 S.Ct. 400, 402, 36 L.Ed. 176 (1892). Otherwise, the power 'is not judicial . . . in the sense in which judicial power is granted by the Constitution to the courts of the United States.' *United States* v. *Ferreira*, 13 How. 40, 48, 14 L.Ed. 42 (1852).
>
> As an incident to the elaboration of this bedrock requirement, this Court has always required that a litigant have 'standing' to challenge the action sought to be adjudicated in the lawsuit. The term 'standing' subsumes a blend of constitutional requirements and prudential considerations, see *Warth* v. *Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 2204, 45 L.Ed.2d 343 (1975), and it has not always been clear in the opinions of this Court whether particular features of the 'standing' requirement have been required by Art. III *ex proprio vigore*, or whether they are requirements

> that the Court itself has erected and which were not compelled by the language of the Constitution. See *Flast* v. *Cohen, supra,* [392 U.S. 83] at 97, 88 S.Ct. [1942], at 1951 [1968].
>
> A recent line of decisions, however, has resolved that ambiguity, at least to the following extent: at an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' *Gladstone, Realtors* v. *Village of Bellwood,* 441 U.S. 91, 99, 99 S.Ct. 1601, 1608, 60 L.Ed.2d 66 (1979), and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision,' *Simon* v. *Eastern Kentucky Welfare Rights Org.,* 426 U.S. 26, 38, 41, 96 S.Ct. 1917, 1924, 1925, 48 L.Ed.2d 450 (1976). In this manner does Art. III limit the federal judicial power 'to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process.' *Flast* v. *Cohen,* 392 U.S., at 97, 88 S.Ct., at 1951."

454 U.S. at 471, 102 S.Ct. at 758.

Applying the "irreducible minimum" to the matter before this Court, it is obvious that plaintiff cannot show that she personally has suffered any actual or threatened injury. The injury, if any, is suffered by McNally.

The Court concludes that plaintiff simply lacks standing to assert this claim and that it therefore fails to state a claim upon which relief can be granted. F.R.Civ.P. 12(b)(6). See generally *Wright, Miller and Cooper:* Jurisdiction 2d, § 3531 *et seg.*

The motion of the defendants Isaacs and Norat to dismiss the complaint will be granted.

3. Transcript on Appeal and Suspension of the Appeal Pending Preparation of the Transcript

Plaintiff seeks to have this Court order the preparation of a written transcript of the videotaped trial. She further seeks to have this Court suspend the briefing schedule before the Supreme Court of Kentucky until the transcript is prepared.

Plaintiff describes her request as two separate requests. We do not view the requests as discrete. They are inextricably interwoven in that ordering a written transcript would of necessity involve suspending the appellate process pending the completion of the transcript.

Of more serious concern to the Court is whether, under the provisions of Title 28 U.S.C. § 2283,[2] this Court, even if so inclined, could grant injunctive relief against the Supreme Court of Kentucky.

Younger v. *Harris*, 401 U.S. 37, 91 S.Ct. 746 (1971), traced the history of § 2283 and its predecessors. After the historical discussion, the Court articulated the reasoning behind the public policy against federal court interference with state court proceedings:

> "The precise reasons for this longstanding public policy against federal court interference with state court proceedings have never been specifically identified but the primary sources of the policy are plain. One is the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the

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[2] "§ 2283. Stay of State court proceedings

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief. The doctrine may originally have grown out of circumstances peculiar to the English judicial system and not applicable in this country, but its fundamental purpose of restraining equity jurisdiction within narrow limits is equally important under our Constitution, in order to prevent erosion of the role of the jury and avoid a duplication of legal proceedings and legal sanctions where a single suit would be adequate to protect the rights asserted. This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as 'Our Federalism,' and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of 'Our Federalism.' The concept does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with

> the legitimate activities of the States. It should never be forgotten that this slogan, 'Our Federalism,' born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future.
>
> This brief discussion should be enough to suggest some of the reasons why it has been perfectly natural for our cases to repeat time and time again that the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions."

401 U.S. at 43, 91 S.Ct. at 750.

The United States Court of Appeals for the Sixth Circuit has recently addressed the question of *Younger* abstention in *Zalman* v. *Armstrong*, 802 F.2d 199 (6th Cir. 1986), and has concluded that:

> "[T]he proper time of reference for determining the applicability of *Younger* abstention is the time that the federal complaint is filed. If a criminal prosecution is pending in state court at this time, *Younger* requires federal noninterference, unless extraordinary circumstances are otherwise found to exist."

802 F.2d at 204.

Exceptions to *Younger* are narrowly construed and, "a federal court should not enjoin a pending state criminal proceeding except in the very unusual situation that an injunction is necessary to prevent great immediate irreparable injury." *Ohio Civ. Rights Com'n* v. *Dayton Christian Schools*, ___ U.S. ___, ___, 106 S.Ct. 2718, 2723 (1986).

Plaintiff's state court appellate counsel does not suggest that it is impossible to prepare a brief from the videotaped transcript. He argues only that, "working from a video record at this point is even more cumbersome than the earlier stage when I was simply viewing the videotape

record and taking notes. The real difficulty is trying to access the video record." Transcript of Hearing on Application for Preliminary Injunction, (hereafter T.H.) 38.[3]

Plaintiff argues that requiring her counsel to prepare a brief from the videotaped transcript presents an equal protection issue.

Plaintiff argues that since any inmate under a death sentence is, upon request, furnished a copy of the transcript in his or her trial, it is a denial of equal protection to require plaintiff and her counsel to work from a videotaped transcript. This argument overlooks the fact that the state Administrative Office of the Courts (AOC) has agreed to furnish a videotape to plaintiff as well as to her counsel. (T.H., p. 8.)

On the other hand, furnishing a videotape transcript without the necessary equipment to view it is the same as furnishing no transcript at all.

As we have noted, AOC as a matter of course furnishes written transcripts to inmates under a death sentence. Plaintiff argues that depriving her of a written transcript is a deprivation of equal protection and we agree that failing to furnish a transcript at all would be a denial of equal protection.

Because of the novelty of the issue, the Court has found no authority addressing the question whether great and immediate irreparable injury will result if counsel is forced to prepare a brief from the videotape transcript. The Court's experience with videotape transcripts is limited to a few habeas corpus petitions in which the Court had to review

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[3]The Court is aware that videotaped trials are viewed in some quarters as an innovative process—an idea whose time has come. This view is not universally held. See *Dorsey* v. *Parke*, 872 F.2d 163 (6th Cir. 1989).

the videotapes. Although the Court finds the procedure unsatisfactory, burdensome, and unduly time-consuming, it is not this Court's function to challenge the wisdom of the Supreme Court of Kentucky in adopting the procedure.

Since the Court will order plaintiff returned to Kentucky during the pendency of her appeal, we find that it will do no violence to *Younger* to order AOC to furnish plaintiff with the videotape transcript and the necessary equipment to review the videotapes.

To order suspension of the appeal pending completion of the plaintiff's brief would be exactly the type of federal court interference against which *Younger* and *Zalman* caution, and the application of plaintiff for injunctive relief compelling suspension of the appellate process will be denied.

Appropriate orders have been entered this 7th day of June, 1989.

/s/ Thomas A Ballantine, Jr.
Thomas A Ballantine, Jr.
United States District Judge

Copies to counsel

No. C 89-0160-L(B)

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

LAFONDA FAY FOSTER - - - - - - - - *Plaintiff*

v.

BETTY KASSULKE, et al. - - - - - - *Defendants*

ORDER—Entered June 7, 1989

For the reasons set forth in the memorandum filed this date,

IT IS ORDERED that the defendants, Betty Kassulke, Elizabeth Chandler, Steve Berry, and John Wiggington, shall forthwith transfer plaintiff, LaFonda Fay Foster, from the place where she is presently confined to the Kentucky Correctional Institution for Women, and

IT IS FURTHER ORDERED that the defendant shall detain plaintiff at the institution until the completion of her direct appeal to the Supreme Court of Kentucky.

There is no just reason for delay, and this is a final and appealable order.

This 7th day of June, 1989.

/s/ Thomas A. Ballantine, Jr.
Thomas A. Ballantine, Jr.
United States District Judge

Copies to counsel

TESTIMONY OF WARDEN HOWARD RAY

Filed August 7, 1991

In the District Court of the United States for
the Western District of Kentucky, Louisville Division

Direct Examination by Ms. Jones:

Q. Mr. Ray, could you state your full name for the record?

A. Howard Ray.

Q. Where are you employed?

A. The Oklahoma Department of Corrections, Mabel Bassett Correctional Center.

Q. What is your position there?

A. I'm the warden....(Transcript, p. 20)

Redirect Examination by Ms. Jones

Q. I would like to hand you what's identified as our Exhibit Number 3. Do you recognize that document?

A. Yes.

Q. And what is that document?

A. It's restrictive housing policy.

Q. And whose signature is at the conclusion of that policy?

A. My signature.

Q. And are there two policies attached to Exhibit 3?

A. Yes.

Q. And would you identify each policy, please?

A. D3 is the restrictive housing , and the second policy attached is the inmate telephone policy.

Q. And could you describe how these two policies work together for the operation of your restrictive housing unit at Mabel Bassett?

A. Well, primarily they complement one another. The MBCC inmate telephone policy is a general overall guideline for telephone policy for offenders, and then the restrictive housing policy goes into detail about restrictive housing, but it also mentions telephone privileges for restrictive housing.

Q> Now, do we have the whole policy here?

A. No, we don't.

Q. Okay. Do we have the relevant section of the policy as to telephone privileges?

A. Yes.

Q. And that's the second page of Exhibit 3 but identified as page 6 of your policy?

A. Yes.

Q. Now, without going into—I don't want you to read the telephone policy, but what is the practice and the implementation of your telephone policy for your death row inmates to contact attorneys?

A. Primarily some advance notice or warning primarily, and that's because of the high security level. There are things that you have to do if you have to take that person out of that area.... (Transcript, pp. 49-51)

Q. So in order to make an attorney phone call, what is the procedure?

A. In order to make an attorney phone call, the offender would need to advise the officer, who would in turn advise the shift supervisor, who would in turn insure that if the individual were going to use the telephone behind the glass, that it would not be monitored.

Q. It would not be monitored?

A. It would not be monitored.

Q. How is that assured?

A. It's assured by just the process of letting us know, because we randomly monitor all inmate telephone calls.

Q. Are the phone calls monitored to confirm that a call is placed to an attorney?

A. They are monitored to confirm — not necessarily to confirm that a call — it's for security reasons basically.

Q. Okay. Now, are they left alone — are they left alone in the area to make the phone call?

A. Yes.

Q. And how long are those phone calls to their attorneys? Are they limited?

A. They are not limited. They are only limited — if it's an attorney phone call, it's not going to be limited, if it's behind that glass area. In general, inmate phone calls are limited to 15 minutes in general if there are other inmates standing in line to use the telephone. But in general, that shouldn't happen that an attorney phone call would be 15 minutes.

Q. Now, are there phone calls that can be placed for the death row inmate not on that phone, but in another area that might be monitored?

A. In the case manager's office, if the collect phone is not used — one of the reasons the collect phone would not be used is if the attorney would not accept collect. Then we would make arrangements for that individual to have a telephone call in the case manager's office with the case manager there.

Q. Okay. So when they exercise that option, they know the case manager is going to remain there throughout the conversation?

A. Yes, because it's a death row inmate. It's the highest security. You do not leave those people alone in an office. . . . (Transcript, pp. 51-53)

Q. Now, as to your phone procedures, are there exceptions created for any reason to the standard phone procedures?

A. Well, yes. If we are aware that a particular offender is working on an appeal on a case and they need more time, then we are going to accommodate them as best we can. . . . (Transcript, p. 54)

Further Redirect Examination by Ms. Jones:

Q. Do you have Exhibit 3? Could you get that? Defendant's Exhibit 3.

A. Yes.

Q. On that second page where there's an indication that the phone time shall be used concurrently with shower time, is that for personal phone calls or attorney phone calls?

A. Personal phone calls.

Q. Why is it different for personal versus attorney phone calls?

A. Well, just the access to courts kind of issue. We are very much aware that when people are working on their cases, that they need more time than 15 minutes.

Q. So the death row inmate is not limited to contacting her attorney and choosing between shower time and phone time?

A. No.

Q. That's the personal phone call?

A. Yes. . . . (Transcript, p. 66)

No. C 86-0970-L(B)

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

KEVIN RAY BLACK - - - - - - - - *Plaintiff*

v.

GEORGE W. WILSON, et al. - - - - - - *Defendants*

MEMORANDUM—Entered June 16, 1987

The plaintiff brought this action pursuant to Title 42 U.S.C. § 1983 alleging a violation of his right to procedural due process as a result of the failure of prison officials to afford him a hearing prior to his transfer from Kentucky to West Virginia. The action is presently before the Court on cross-motions for summary judgment.

The Fourteenth Amendment prohibits any state from depriving a person of life, liberty, or property without due process of law. An inmate is entitled to a hearing prior to his transfer only if he had a constitutionally protected liberty interest in remaining in the state. *Olim* v. *Wakinekona*, 461 U.S. 238 (1983). The Due Process Clause of the Fourteenth Amendment does not, in and of itself, implicate such a liberty interest. *Id.* However, the state may create a protected liberty interest by placing substantive limitations on official discretion. "An inmate must show 'that particularized standards or criteria guide the State's decisionmakers.'" *Id.* at 249, quoting *Connecticut Board of*

Pardons v. *Dumschat*, 452 U.S. 458 at 467 (1981). In other words, the inmate must have a "justifiable expectation rooted in state law that he will not be transferred except for misbehavior or upon the occurrence of other specified events." *Montanye* v. *Haymes*, 427 U.S. 236 at 242 (1976). Under Kentucky's prison regulations "out-of-state transfers may only be recommended for safety, security or medical reasons." Corrections Policies & Procedures VI(A)2. This policy does not put a substantive limitation on official discretion which would implicate an inmate's liberty interest, for prison officials may transfer any individual inmate in order to meet its general goal of better safety or security. If the transfer of an inmate was limited by regulation to instances where there was a finding of misconduct by the inmate, then the plaintiff's liberty interest would have been implicated by his transfer to West Virginia. *Id.* at 243; *Meachum* v. *Fano*, 427 U.S. 215 at 228 (1976).

The plaintiff asserts that the regulation which provides for an opportunity to present information to the Classification Committee relative to the out-of-state placement prior to his transfer places a substantive limitation on the right to transfer. See Corrections Policies and Procedures VI(B). Although the state may choose to grant an inmate this opportunity, it does not create an independent substantive right protected under the Due Process Clause. *Wakinekona* at 251. The plaintiff also alleges that he did not receive the required hearing. Since there is no liberty interest implicated in plaintiff's transfer, the right to demand the hearing is a "needless formality," and the failure to provide a hearing does not violate due process. *Id.* at 250.

The plaintiff also alleges that his procedural due process rights were violated at an Adjustment Committee hearing on a charge of fighting. Allegedly he was not permitted to call a witness on his own behalf. A notation on the incident report states "Waived Jim Morse," but the plaintiff asserts that Morse was waived by the committee. The plaintiff did request another witness and apparently, he did testify.

Although the Supreme Court stated in *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), that an inmate should be permitted to call witnesses on his own behalf, the Court also made it clear that there is no absolute right to call witnesses, stating that a degree of flexibility and accommodation is required. *Id.* at 566. Even if the committee did waive the appearance of Morse, his testimony would not have exonerated the plaintiff of the charges. Allegedly, Morse, a medical technician, would have testified that plaintiff's assailants were not injured while the plaintiff sustained facial lacerations and contusions in the fight. However, there was testimony from a prison officer that the plaintiff was on the ground wrestling with another inmate and refused several orders to break apart. This evidence satisfies the due process requirement that there must be a modicum of evidence to support the conclusions of the committee. *Walpole* v. *Hill*, 472 U.S. 445 (1985).

The plaintiff also alleges that the living conditions at the West Virginia Penitentiary are so inadequate that sending him there would be cruel and unusual punishment under the Eighth Amendment to the U.S. Constitution. The constitutional issue is not whether it is proper to send the plaintiff to West Virginia, but whether the conditions are adequate under the Constitution. Since this Court does not have jurisdiction over the West Virginia parties who could remedy the alleged inadequate conditions, this Court cannot entertain the issue. The plaintiff should raise this issue before a court of that state.

The Court will grant defendant's motion for summary judgment.

An appropriate order has been entered this 16th day of June, 1987.

/s/ Thomas A. Ballantine, Jr.
Thomas A. Ballantine, Jr.
United States District Judge

Copies to counsel

No. C 86-0970-L(B)

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

KEVIN RAY BLACK - - - - - - - - *Plaintiff*

v.

GEORGE W. WILSON, et al. - - - - - - *Defendants*

ORDER—Entered June 16, 1987

For the reasons set forth in the memorandum filed this date,

IT IS ORDERED that the motion of the defendants, George W. Wilson, Al C. Parke, Steve Berry, Gene A. Scroggy, Glenn Haberlin, John Rees, Kenneth Case and Ed Conway, for summary judgment on the complaint of the plaintiff, Kevin Ray Black, against them be and it is hereby granted, and this action be and it is hereby dismissed with prejudice.

There is no just reason for delay, and this is a final and appealable order.

This 16th day of June, 1987.

/s/ Thomas A. Ballantine, Jr.
Thomas A. Ballantine, Jr.
United States District Judge

Copies to counsel

NOT FOR PUBLICATION

No. 87-5798

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KEVIN RAY BLACK, - - - - *Plaintiff-Appellant,*

v.

GEORGE W. WILSON, et al. - - *Defendants-Appellees.*

ORDER—Issued May 10, 1988

BEFORE: LIVELY, Chief Judge; JONES and MILBURN, Circuit Judges.

This case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination of the record and the briefs, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

The plaintiff, a Kentucky prisioner, appeals the judgment of the district court which dismissed his 42 U.S.C. § 1983 action. In his complaint, the plaintiff alleged that he was transferred from the Kentucky prison system to the West Virginia State Prison at Moundsville, West Virginia, in violation of the fourteenth and eighth amendments. The plaintiff further claimed that his fourteenth amendment right to due process was violated during a disciplinary proceeding at the Kentucky State Penitentiary (KSP).

After motions for summary judgment were filed by all parties, the district court entered an order dismissing the plaintiff's action. In so doing, the district court concluded

that the plaintiff had no state-created liberty interest from out of state transfer and that the plaintiff's due process rights were not violated by the actions of the KSP disciplinary committee.

We have carefully reviewed the record and the arguments of the parties. Based on our review, we conclude the district court properly dismissed the complaint. Accordingly, for the reasons set forth in the memorandum and order entered on June 16, 1987, the judgment of the district court entered on the same date is affirmed pursuant to Rule 9(b)(5), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

No. C 90-0026-P(J)

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

LEO SPURLING, - - - - - - - - - - *Plaintiff*

v.

JOHN WIGGINTON;
WILLIAM C. SEABOLD;
GLENN HAEBERLIN;
PATTI WEBB; and
STEVE BERRY, - - - - - - - - - - *Defendants*

MEMORANDUM—Entered January 23, 1990

Plaintiff, Leo Spurling, has tendered a complaint under 42 U.S.C. Section 1983, accompanied by a motion to proceed *in forma pauperis* without the prepayment of fees, costs, or the giving of security therefor.

The motion is granted, and the complaint is ORDERED filed.

The statement of claim relates that plaintiff was involuntarily transferred from Kentucky State Penitentiary in Eddyville, Kentucky, to Oklahoma State Penitentiary in McAlster, Oklahoma. Plaintiff alleges that this transfer has deprived him of meaningful access to his attorneys, Kentucky legal materials, and to the Kentucky courts, and that the conditions at OSP are significantly inferior to those at KSP, thus depriving plaintiff of rights, benefits, and obligations of the Consent Decree entered by defendants'

predecessors in 1980. He states that he has suffered substantial emotional trauma as a result of his transfer.

To establish a right to relief under 42 U.S.C. Section 1983, a plaintiff must plead and prove at least two elements: (1) that he has been deprived of a right secured by the Constitution and laws of the United States; and (2) that the defendant deprived him of this right while acting under color of law. *Flagg Brothers, Inc.* v. *Brooks,* 436 U.S. 149 (1978); *Paul* v. *Davis,* 424 U.S. 693 (1976); *Adickes* v. *S. H. Kress & Co.,* 398 U.S. 144 (1970).

State prison officials generally are given wide latitude in decisions whether to transfer inmates from one institution to another. Unless there exists a state-created policy protecting a prisoner's interest in being housed in any one location, the prisoner has no constitutional interest in being transferred to or remaining in a particular facility. *Meacham* v. *Fano,* 427 U.S. 215 (1976); Montanye v. *Haymes,* 427 U.S. 236 (1970). The State of Kentucky has not created any policy which would provide plaintiff a protected liberty interest in remaining in a particular institution or which would give him a right to be involved in prison officials' transfer decisions. *See Ky. Rev. Stat.* 196.070(5). While plaintiff may have enjoyed certain privileges at the Kentucky State Penitentiary, he did not acquire a constitutional right to the continuation of said privileges which would entitle him to relief under 42 U.S.C. Section 1983.

Plaintiff's complaints as to the unconstitutional conditions of confinement existing at the Oklahoma State Penitentiary are not properly brought against defendants, since defendants are not responsible for the conditions existing in Oklahoma. If plaintiffs believe that the officials in that State have violated his constitutional rights, he is free to attempt to pursue his cause of action in the appropriate Oklahoma court.

For the foregoing reasons, the complaint will be dismissed for failure to establish a right to relief under 42 U.S.C. Section 1983. An *in forma pauperis* complaint may be dismissed under 28 U.S.C. Section 1915(d) without service of process or prior notice to plaintiff if the district court makes the determination that it is frivolous or malicious. *Spruytte* v. *Walters,* 753 F.2d 498 (6th Cir. 1985). A complaint is considered frivolous "if it lacks an arguable basis either in law or in fact." *Neitzke* v. *Williams,* 109 S.Ct. 1827, 1831 (1989).

We hold that the facts alleged in the complaint do not present an arguable basis either in law or in fact. The complaint will therefore be dismissed in accordance with 28 U.S.C. Section 1915(d) for the specific reason that it is frivolous. *Harris* v. *Johnson,* 784 F.2d 222 (6th Cir. 1986).

A separate Order dismissing the complaint will be entered this date.

Date: January 22, 1990

/s/ Johnstone
Edward H. Johnstone, Chief Judge
United States District Judge

Copies to:
Plaintiff
Defendants
Gen. Counsel, Dept. of Corrections

No. C 90-0026-P(J)

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

LEO SPURLING, - - - - - - - - - *Plaintiff*

v.

JOHN WIGGINTON;
WILLIAM C. SEABOLD;
GLENN HAEBERLIN;
PATTI WEBB; and
STEVE BERRY, - - - - - - - - - *Defendants*

ORDER—Entered January 23, 1990

Plaintiff having tendered a complaint, and the Court having entered its Memorandum Opinion, and being fully advised in the premises,

IT IS ORDERED that the complaint be FILED of record.

IT IS FURTHER ORDERED that the plaintiff's complaint is DISMISSED for lack of subject matter jurisdiction.

This is a final and appealable Order, and there is no just cause for delay.

Date: January 22, 1990

/s/ Johnstone
Edward H. Johnstone, Chief Judge
United States District Court

Copies to:
Plaintiff
Defendants
Gen. Counsel, Dept. of Corrections

NOT FOR PUBLICATION

No. 90-5330

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LEO SPURLING, - - - - - *Plaintiff-Appellant,*

v.

JOHN WIGGINTON;
WILLIAM C. SEABOLD;
GLENN HAEBERLIN;
PATTI WEBB; and
STEVE BERRY, - - - - - *Defendants-Appellees.*

ORDER—Filed June 27, 1990

BEFORE: KRUPANSKY and NORRIS, Circuit Judges; and LIVELY, Senior Circuit Judge.

Leo Spurling appeals an order of the district court which dismissed his civil rights action. He now moves for the appointment of counsel. Based upon a review of the record, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Spurling tendered an application for leave to proceed in forma pauperis and a complaint pursuant to 42 U.S.C. § 1983 in the District Court for the Western District of Kentucky. In support of his request for a declaratory judgment, injunctive relief, and monetary damages, he alleged that during the pendency of the appeals from some of his convictions before the Kentucky Supreme Court, defendants improperly obtained his transfer from the Kentucky State

Penitentiary at Eddyville to a prison located in the state of Oklahoma. He maintained that this action was improper because living conditions in Oklahoma prisons were generally less desirable than those in Kentucky and he no longer had direct access to Kentucky legal materials or the attorneys who had been appointed to represent him in his appeals. Based upon the principle that Spurling had no protectible interest in the determination of the place of his confinement, the district court concluded that those claims were frivolous and dismissed the complaint pursuant to 28 U.S.C. § 1915(d). Spurling then filed this appeal.

After a thorough review of the record, this court has concluded that the district court did not err in dismissing the complaint for reason of frivolity under 28 U.S.C. § 1915(d). *Neitzke* v. *Williams*, 109 S. Ct. 1827, 1831 (1989). Accordingly, the motion for appointment of counsel is denied and the district court's final order is hereby affirmed. Rule 9(b)(5), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

Supreme Court, U.S.
FILED
DEC 28 1992
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992
NO. 92-914

BETTY KASSULKE, et al.
Petitioners

V.

LAFONDA FAY FOSTER,
Respondent

RECEIVED
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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

WHETHER THIS COURT SHOULD SPEND PRECIOUS TIME MICRO-MANAGING THE LOWER FEDERAL COURTS WHO IN THIS CASE CAREFULLY CRAFTED RELIEF FOR UNNECESSARY INTERFERENCE WITH APPOINTED COUNSEL FOR A DEATH ROW INMATE WHEN THE RELIEF ITSELF IS NOW CONTINGENT ON FUTURE EVENTS?

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COUNTERSTATEMENT OF THE CASE

Respondent, Foster rejects the editorial comment in the petitioners' statement of the case. For example, when Ms. Foster was returned to Kentucky in 1989, she did not place any "extraordinary administrative burdens on Corrections..." [Petition for Writ of Certiorari, hereinafter Petition, 4]. No federal judge has agreed with this claim - unsupported by fact - yet petitioners continue to make it. Upon her return to Kentucky, this female death row inmate was simply "locked-down" with other female administrative segregation inmates in one wing of a male institution. There was nothing extraordinary or different about this in-state incarceration.

Corrections further claims that the initial preliminary injunction was issued "because of inadequate phone access to appointed counsel in Kentucky" [Petition for Writ of Certiorari, hereinafter Petition, 3-4]. The holding was not nearly so narrow.

> [I]t cannot be seriously argued that an 800-mile separation between plaintiff and her counsel is not an impediment to effective representation... Whether or not the transfer to Oklahoma was retaliatory, the result is that plaintiff is deprived of her right to consult with her attorney... [I]t is apparent that in plaintiff's case, her transfer to Oklahoma so interferes with her ability to communicate with her appellate counsel that *under these circumstances* it rises to the level of constitutional deprivation. Plaintiff has shown significantly more than mere inconvenience; her almost complete inability to communicate with her attorneys amounts to a denial of the right to counsel [Appendix to Petition, hereinafter Appendix, 20a].

The "access" problems identified by the court below could have been easily repaired - confidential telephone calls, a videotape machine and/or Kentucky law books, etc. Inexplicably, Corrections refused to lift a finger to influence any of Foster's conditions in

Oklahoma. It is the irrationality of Corrections' position, not any undue administrative burden on the state, that gives rise to this continued litigation.

By way of background, this Court must understand that Fay Foster was targeted for out-of-state transfer because of her sex even before she was sentenced to death and transferred from the local jail to the state prison in May, 1987. The lower court declined to reach this issue because it held the circumstances surrounding the transfer had denied respondent access to her counsel [Appendix 21a]. Foster's April 1991 motion for a permanent injunction again urged that her transfer to Oklahoma would interfere with her right to counsel, would be based on her sex and would constitute retaliation for her ongoing protests that her conditions of confinement were not comparable to those of death sentenced men[1] [Docket Entry 59]. In ordering Ms. Foster's return to Kentucky within forty-eight (48) hours of any denial of certiorari, the court specifically rejected respondent's retaliation claim, did not reach the claim that her transfer was based on her sex and accepted her argument that being lodged in Oklahoma would interfere with her access to the Kentucky courts once she is appointed new counsel and must file a post-conviction action [Appendix 12a-13a, 14a, 16a]. It was only from the last order that Corrections appealed. The district court's order required that she be transferred back to Kentucky only if her convictions were affirmed by the Supreme Court of Kentucky and certiorari was denied by the United States Supreme Court and only if...

> ...the Corrections Cabinet [refused] by contractual agreement with [Oklahoma] officials, [to] provide adequate... access to the courts of Kentucky.

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[1]This is the real genesis of this litigation.

[Appendix 12a].

In the interim, Foster won a new sentencing hearing in the Kentucky Supreme Court. Foster v. Commonwealth, Ky., 827 S.W.2d 670 (1991), cert. denied, _____ S.Ct. ____ (1992). Therefore, any further "imposition" on the state is speculative.

REASONS FOR DENYING CERTIORARI REVIEW

I. UNLESS RESPONDENT AGAIN RECEIVES A SENTENCE OF DEATH AFTER HER RESENTENCING, THIS WASTEFUL LITIGATION IS MUCH ADO ABOUT NOTHING.

While it is true that this action is not "moot" [Petition for Writ of Certiorari, hereinafter Petition at 3 n.2], and the Sixth Circuit agreed [Appendix to Petition, 2a n1, "This action does not moot the questions presented here."], any further impact of the lower court order is contingent on future events. As such, this case is a particularly inappropriate vehicle for addressing the routine, really mundane, access to courts issue present.

II. THIS COURT HAS BETTER THINGS TO DO THAN REHEAR THE FACTUAL DISPUTES FOUR FEDERAL JUDGES HAVE RESOLVED IN RESPONDENT'S FAVOR.

Inmates, including death row inmates, must be assured access to the courts that is "adequate, effective and meaningful..." Bounds v. Smith, 430 U.S. 817, 822 (1977). Obviously, appointment of counsel would satisfy the constitutional right to access to the courts...[2] *but not if the prison wouldn't let the lawyer in*. Despite the one-sided rendition of the facts by petitioners, key factual disputes relevant to the access issue were resolved in respondent's favor. The United States Supreme Court is not the proper forum to attempt relitigation of disputed facts.

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[2]The right at issue implicates more than one constitutional concern. Wolf v. McDonnell, 418 U.S. 539 (1974) [due process]; Procunier v. Martinez, 416 U.S. 396, 419 (1974) [due process]; Pennsylvania v. Finley, 481 U.S. 551, 557 (1987) [equal protection]; Murray v. Giarratano, 492 U.S. 1, 7, 11 n.6 (1989) [equal protection]; Turner v. Safley, 482 U.S. 78, 84 (1987) [first amendment]; Hudson v. Palmer, 468 U.S. 517, 523 (1984) [first amendment].

Surely the "requirement of meaningful access can be satisfied in various ways" and "prison administration must be given 'wide discretion' to select appropriate solutions." Murray v. Giarratano, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring), quoting Bounds, 430 U.S. at 833. The problem here for petitioners is that they selected none of the available alternatives. It would have been a simple matter to provide Ms. Foster with confidential attorney calls, Kentucky law books[3], access to a videotape machine to review the record of her trial, etc. Corrections was not willing to do anything despite the grave penalty the condemned faced, the important and well established constitutional rights implicated and Corrections' own regulations. Corrections' intransigent position in this litigation has been inexplicable.

This case does not present any important or significant issue worthy of attention by this Court. The Kentucky-Oklahoma transfer resulted/would result in a denial of access to the courts because Ms. Foster's inability to communicate with (new) counsel, denial of confidential phone conversations, inability to review the record of her trial, the great distance between counsel and client and the absence of Kentucky law books in the Oklahoma institution all served to convince the lower courts to order Foster's return to Kentucky for limited periods of time to consult with her lawyers... *unless other steps were taken to permit access.*

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[3]However, "[w]here female prisoners lack their male counterparts' history of 'self help' in the law... equal protection considerations may require the library facilities be supplemental by assistance of a lawyer. Canterino v. Wilson, 546 F.Supp. 174, 216 (W.D. Ky. 1982), aff'd No. 86-6067, 1989 WL 40131, 1989 U.S. App. Lexis 4789 (6th Cir. April 10, 1989 [875 F.2d 862 (table)] unpublished), cert. denied, 493 U.S. 991... (1989)." Knop v. Johnson, 977 F.2d 996, 1003 n.4 (6th Cir. 1992).

The absurdity of petitioners' fallback position can be best seen in their (rejected) position that respondent can only be permitted to avail herself of Oklahoma courts (or the courts of any other jurisdiction to which she is sent) and not Kentucky courts to complain that she is denied access to her Kentucky counsel. Yet, if Foster cannot obtain adequate legal assistance of lawyers she already has, how then is she supposed to access the Oklahoma courts on this issue?[4]

Respondent agrees there is "no set formula" for providing adequate access to the courts, or in this case, counsel [Petition, 10]. Nor was one imposed below. In fact, the relief crafted by the district court permits Corrections to fashion any reasonable means to permit this death row inmate[5] access to her lawyers when she is in the hands of a foreign jurisdiction.

> The defendants have not carried their burden to prove that the resources available to Foster [in Oklahoma]... are adequate to ensure access to the Kentucky courts.... *[T]he Corrections Cabinet [may]... by contractual agreement with [Oklahoma] officials... provide adequately for Foster's access to the courts of Kentucky.*

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[4]Warden Ray of Oklahoma was unable to name any attorneys in Oklahoma to whom Fay Foster could turn if she had problems relating to communication with her Kentucky counsel or with conditions at the Oklahoma prison [Docket Entry 93]. Additionally, Warden Ray acknowledged he had no books on Kentucky law and no plans to get any. [Docket Entry 93].

[5]While the sentence a person receives is not dispositive of adequate access claims, it is not irrelevant, as Corrections claims, that respondant was under a sentence of death. See generally Murray v. Giarrantano, 492 U.S. 1 (1989). Death penalty cases are different, not because respondent says so, but because every member of the Supreme Court since Furman has so declared. As a form of punishment, death is qualitatively different from any other, calling for more meticulous procedures regarding critical legal issues.

[Appendix, 12a].

Corrections' claim that the lower court order requires Kentucky "oversight of the Oklahoma prison system..." is frivolous. It would be a simple matter to arrange for a videotape machine, confidential phone calls, Kentucky law books, etc., as part of the agreement with Oklahoma. Importantly, Kentucky law requires this. In criminal cases, the Sixth Amendment protects the attorney-client relationship from unwarranted intrusion. Wolff v. McDonnell, 418 U.S. 539, 576 (1974).

The Interstate Corrections Compact, codified in Kentucky as Ky. Rev. Stat. [KRS] 196.610, Article IV(e) provides as follows:

> The fact of confinement in a receiving state shall not deprive any inmate so confined of any legal rights which said inmate would have had if confined in an appropriate institution of the sending state.

Under the Interstate Compact, the sending state continues to have jurisdiction over its inmates. KRS 196. 610, Article IV(c). Article IV(e) provides that confinement in a receiving state shall not deprive an inmate of any legal right he would have had if confined in the sending state; and, Article IV(h) provides that a transferred inmate "shall have any and all rights to participate in and derive any benefits... on account of any action or proceeding in which he could have participated if confined in any appropriate institution of the sending state located within such state." Certainly a federal court, which has jurisdiction over the Kentucky Corrections Cabinet, which has jurisdiction over the inmate facing transfer, had every right to order Corrections not to effectuate a transfer that would violate an inmate's

constitutional or statutory rights. By virtue of KRS 196.610, there is no competing state correctional interest here. See generally Rich v. Zitnay 644 F.2d 41 (1st Cir. 1981) [sending state retained responsibility for legal assistance; prisoners without counsel or a library containing sending state's law stated cause of action; burden on sending state to show adequate alternatives]; Messere v. Fair, 752 F.Supp. 48 (D.Mass. 1990) [same]; Hohman v. Hogan, 458 F.Supp. 669 (D.Vt. 1978) [assuming same, prisoner in Illinois must be provided access to Vermont courts]; Hudson v. Israel, 594 F.Supp. 664, 669 (E.D. Wisc. 1984) [same but dismissing action "against a party who had no personal involvement..."]; Blake v. Berman 625 F.Supp. 1523 (D.Mass. 1986) [sending state's corrections officials retained responsibility for assuring access to Massachusettes courts while prisoner in Kansas]; Benjamin v. Potter, 635 F.Supp. 243 (D.Virgin Islands 1986), aff'd, 838 F.2d 1205 (3rd Cir. 1988) [Virgin Islands had responsibility to prisoners transferred to mainland prisons to facilitate access to Virgin Islands courts]; Brown v. Smith, 580 F.Supp. 1576 (M.D. Pa. 1984) ["persuasive" that sending state shoulders the burden to provide state law books or counsel].

"[W]hile neither controlling nor fully measuring the Court's discretion," Supreme Court Rule 10.1, "indicates the character of reasons" the Court will consider in granting certiorari review. None of these reasons apply here. There is neither a conflict in the circuits[6], Rule 10.1(a), or with a state's highest court, Rule 10.1(b), nor an "important

[6]The decisions relied upon by petitioners are all factually distinguishable. Some appear to have little to do with the issue at hand. See Logue v. United States, 412 U.S. 521 (1973) [U.S. Marshall not liable under Federal Tort Claims Act for federal prisoner's suicide in county jail]; Black v. Wilson, 838 F.2d 470 (6th Cir. 1988) [App. 36a-41a] [unpublished; not involving interference with counsel]; Spurling v. Wigginton, 907 F.2d 151 (6thCir. 1990)

question of federal law..." Rather, we have here a fact bound, unique and contingent order without a single dissent below.

III. BY FAILING TO APPEAL OR OTHERWISE OBJECT TO THE PRELIMINARY INJUNCTION ENTERED ON JUNE 7, 1989, THE PETITIONERS HAVE FORFEITED THE RIGHT TO CHALLENGE THE UNDERLYING MERITS; AND, IN ANY EVENT, CERTAINLY SHOULD NOT BE PERMITTED TO DO SO IN THE UNITED STATES SUPREME COURT.

The imposition placed on respondent by the courts below was slight, yet this fact was ignored in the Petition. As Corrections has acknowledged, there was no appeal from the entry of the preliminary injunctions in June, 1989. That injunction required that Foster be returned to KCIW "until the completion of her appellate brief [sic] and oral arguments are heard in her appeal" [Appendix 23a]. In March, 1991, prior to oral arguments, Corrections made a motion to lift the injunction [Docket Entry 55]. No new facts were alleged. The lower court refused. The Sixth Circuit affirmed.[7]

There is a "requirement that a successive motion state new facts warranting

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[App. 42a-47a] [unpublished; not involving interference with counsel]; Stewart v. McManus, 924 F.2d 138, 1141 (8th Cir. 1991) [Kansas disciplinary rules needn't be applied in Iowa. Interstate Corrections Compact provides that "*disciplinary* authority shall be exercised by the receiving state..."]; Johnson v. Barry, 815 F.2d 1119 (7th Cir. 1987) [applying Illinois disciplinary rules to federal inmate had rational relationship to legitimate state purpose]; Cannon v. United States, 645 F.2d 1128 (D.C. Cir. 1981) [jurisdiction of Federal Tort Claims Act]; Owens v. Haas, 601 F.2d 1242 (2nd Cir. 1979), cert. denied, 440 U.S. 980 (1980) [federal prisoner can sue when housed in county jail under contract]; Henderson v. Thrower, 497 F.2d 125 (5th Cir. 1974) [federal prisoner can sue when housed in county jail under contract].

[7]Interestingly, this claim formed the basis of petitioners' lead issue in the Sixth Circuit. Now, however, Corrections abandons this approach and focuses on the district court's subsequent order.

reconsideration of the prior decision." F.W. Kerr Chemical Company v. Crandall Associates, Inc., 815 F.2d 426, 428 (6th Cir. 1987). Corrections did not meet that requirement; they did not advance "new facts." Of course, Corrections did not appeal the portion of the lower court's order requiring that Ms. Foster remain in Kentucky until oral arguments were concluded, which they had a right to do. 28 U.S.C. Section 1292(a)(1). Certainly, that failure "would logically preclude a subsequent interlocutory appeal under Section 1292(a)(1) from an unwarranted successive motion." Id. at 429. The present case represents "an unwarranted successive motion." The Sixth Circuit agreed.

> Because the Kentucky officials did not appeal from the grant of the preliminary injunction, the general rule is that they cannot now challenge the merits of the underlying injunction. Cerro Metal Products v. Marshall, 620 F.2d 964, 972 (3rd Cir. 1980); See, Merrell-Nat'l Labs, Inc. v. Zenith Labs., Inc., 579 F.2d 786, 791 (3rd Cir. 1978). Rather, review should be confined to the propriety of refusing to vacate or modify it; the inquiry should be whether the Kentucky officials have demonstrated that changed circumstances make the continuation of the injunction inequitable. Winterland Concessions Co. v. Trela, 735 F.2d 257, 260 (7th Cir. 1984).

[Appendix, 2a-3a].

This case is in an extremely poor posture for review by this great Court.

CONCLUSION

It hardly impinges upon state decision-makers to require a modicum of rationality to support actions which directly infringe upon important constitutional rights. In this case, respondent's legal position made so much sense in 1989 that petitioners didn't even protest (motion to reconsider, appeal) when the initial relief was ordered. Requiring a receiving state to allow a death-sentenced inmate unmonitored attorney phone calls and/or

necessary law books is not a great or even significant imposition on a sending state. In any event, there is no issue presented in the certiorari petition worthy of the time of this Court, or any federal judge for that matter.

THEREFORE, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992
NO. 92-914

BETTY KASSULKE, et al.
Petitioners

V.

LAFONDA FAY FOSTER,
Respondent

CERTIFICATE OF SERVICE

I, Gail Robinson, counsel for plaintiff, certify that the attached brief in opposition to the petition for certiorari, and motion to proceed in forma pauperis and notice of appearance were mailed to the Office of the Clerk of the United State Supreme Court and to counsel for respondent, Barbara Jones, Department of Corrections, State Office Building, Room 200, Frankfort, Kentucky 40601 on this 28th day of December, 1992 by personally depositing same in a United States mail box, first class postage prepaid. The affidavit in support of the motion to proceed in forma pauperis will be forwarded upon receipt from my client.

Gail Robinson

Gail Robinson, Esq.

Subscribed and sworn to before me, a notary public, on this 28th day of December, 1992.

Julia Lea

Notary Public
State of Kentucky at Large

My commission expires 10/30/95.